In the Supreme Court of the United States.

ALBERT BOULDIN, *et al.*, Appellants, *vs.* JOSEPH ALEXANDER, *et al.*, Appellees. } No. 62.

AN APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF OF S. S. HENKLE FOR APPELLANTS.

This is the second time that this case has been in this Court.

The main case was decided by this Court at the October Term, 1872, and is reported in 15th Wall., 131.

STATEMENT OF THE CASE.

The original bill was filed September 28, 1867, by the present appellees, claiming to be the rightful Trustees of the Third Colored Baptist Church, of the City of Washington, against the present appellants.

The original case is so fully stated in the report in 15 Wall., that a re-statement by me is unnecessary, and I re

spectfully refer the Court to the statement of the case, and the opinion of Mr. Justice Strong for information as to the original case.

The decree of the Court below was affirmed in this Court.

That decree established:

1st. That the appellees were the Trustees of the Third Colored Baptist Church, and that the appellants, nor either of them, were trustees of said Church.

2d. That the appellees were entitled to the present custody, control and possession of the Church building.

3d. The defendants, and each of them, were required to deliver the possession to plaintiff in one week, or that a writ of possession issue. The appellants were enjoined from taking possession of, or interferring or meddling with it.

The defendant, Bouldin, was enjoined from collecting his notes against the Church, secured by deed of trust, until the further order of the Court; and the Trustee in the deed of trust was also enjoined from selling the property under the trust. The misdescription of the property in the deed from Bouldin, was ordered to be corrected.

And the cause was referred to the Auditor to examine and report the facts upon the following questions:

1. Whether the defendant, Bouldin, purchased under the direction of the Church, the entire lot of ground on the corner of 4th and L streets; of George H. Varnell, for the use or benefit of said Church, and whether the money col-

lected by said Bouldin from or on behalf of the Church, was by him used to aid in the payment for said lot, and if so, to what amount?

2. To state the account between the said *Albert Bouldin*, and the plaintiffs as Trustees of the said Church, and the Trustees of whom they are the successors; and to report the amount of money received by the said Bouldin from the said Church, and the amount to which he was entitled for his services in behalf of said Church, and has expended in and about the same; and to state the balance due either way; and for these purposes he may call witnesses and take testimony.

That the plaintiffs, until further order of this Court, are enjoined and restrained from selling, disposing of, or in any way encumbering the title of said Church property so as to weaken the security of said Bouldin upon said Church property.

The record shows the proceedings subsequently had in the Court below, until the second appeal to this Court.

On the 6th of March, 1873, the case came on for hearing, upon the application of the complainants, for a writ of possession, and the Court ordered that the writ should not issue until the coming in of the report of the Auditor, and the further order of the Court; and by consent of defendants' counsel, they added two additional questions, to be found by the Auditor in addition to those already ordered, viz:

3. In whose possession has the Church building and property on the corner of 4th and L streets, Washington, D. C., been since the commencement of this suit?

4. What is the fair value of the rents, issues and profits

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arising and accruing to the party in possession of said property from and since the commencement of this suit? See. Rec. p. 1.

The Auditor made his report, commencing on page 1 of the Record. He allowed Bouldin nothing. He finds the defendants have been in the possession of the property from the filing of the bill, and charges them with rent from September 28th, 1867, to October, 1875, at the rate of $498.33 per annum, and interest calculated upon quarterly installments for each year, making a total of $4,910.26.

The report was excepted to upon several grounds and among them to this allowance of rent and interest.

The Equity Court sustained the exception to this item and disallowed it, and sustained others of the exceptions, and ordered the case back to the Auditor to restate the account.

This order is found on pp 51—2 of the Rec.

From this order both parties appealed to the General Term.

That Court reversed the decree of the Equity Court and rendered a joint and several decree against all the defendants for $4,734.12 "as mesne profits for the use and occupation by them of the church premises during the pendency of this suit, to-wit: From the commencement of the suit until March, 31st, 1877, when the said premises were returned to the plaintiffs."

It does not include the notes of Bouldin, but rejects and disallows all other claims made by him against the church. It dissolves the injunction against Bouldin from collecting his notes, and also removes the restraint from Barnaclo, the Trustee, from selling, under the trust.

The decree is on pp. 53—4 of the Rec.

ASSIGNMENT OF ERRORS.

1st. The Court erred in rendering any decree against the defendants for rents of the church property.

2d. The Court erred in rendering a joint and several decree against the defendants.

3d. The Court erred in rendering a decree for "mesne profits."

4th. The Court erred in rendering a decree for "use and occupation."

5th. The Court erred in adopting the Auditor's mode of estimating the rental value of six per cent. upon the value of the property.

6th. The Court erred in allowing the charge for rents from Sept. 28, 1867, to March 31, 1877. If allowed at all it should not have extended back more than three years, that being the statute of limitations upon action for use and occupation in the District of Columbia.

7th. The Court erred in rendering any decree for rents because it was not claimed nor prayed for in the original or supplemental bills, nor was it within the scope of the relief sought by said bills.

8th. The Court erred in rejecting and disallowing all claims of Albert Bouldin, except the notes, because said decree was at variance with the decree of June 2d, 1869, of the Equity Court of the District of Columbia, which decree had been approved and adopted by this Court.

9th. And for other errors appearing on the face of the record.

ARGUMENT.

Here was an honest controversy between two factions in this church, as to which party was entitled to the possession and control of the church property, and the administration of the church discipline. These people were all illiterate colored people, and all the evidence and circumstances show that each party supposed it was the rightful authority.

The plaintiffs and defendants happened to be the trustees representing the contending factions, except brother Bouldin, who was not a trustee, but the pastor of the discordant flock. These appellants had no more interest in the temporalities of the church than any others of their party, they were simply representatives. And yet, the court below rendered a decree against them jointly and severally for nearly $5.000 for the rents of the church during the time that the right to its possession was in litigation. The decree also embraced Bouldin, who was not a trustee at all, but the pastor.

The appellants derived no profit from the church, and every body, including the appellees, was at liberty to come there and worship.

It is true the appellants held possession a long time after the decision of the question of right by this court, but as we have seen on the 6th of March 1873, the Equity Court ordered that the writ of possession should not issue until the coming in of the Auditor's Report, and the further order of the court; and that further order never was made, until the 28th day of March, 1877, and the possession was surrendered on the 31st of March. Whether the writ was served or not, the record does not show, so that the appellees were not contumacious.

It seems to me that it would be a great hardship, and a wrong to charge any one of these illiterate men $5,000, or $7,000 or $8,000 with the interest, for contesting the right of his party to the possession of his church in the courts, until the question was finally settled against him.

From March 6th, 1873, to March 28th, 1877, they held by permission of the Equity Court of the District, in which the cause was pending, and certainly for that period there was no contumacy, and there should be no charge for rent; and prior to the 6th of March, 1873, there should be none, for the question of right was not finally determined until the spring of 1873.

The Third Colored Baptist Church was unincorporated, and was a mere voluntary association, and so far as its temporalities were concerned in contemplation of law a partnership, in which each of the parties was equally and jointly interested with each, and all the others. The appellants merely held the nominal possession for all the members of the firm, and if there is a liability for rent at all, it is against all the members, or partners, and they must all be sued. You can't sue A and B alone for the debt of a partnership, of which there are other members, because they are the managing members. Nor can a part of the members of a firm or a part of tenants in common sue their co-partners, or co-tenants for rent of the common property, unless they have excluded them from the joint enjoyment of it, and then they could only sue for their *share*. But here is a decree in favor of certain members of a co-partnership against certain other members, for the entire rental value of the common property, in which each had equal rights of enjoyment.

These parties were not dealing with each other as stran-

gers. They were members of the same co-partnership, each and all of them having equal and co-extensive rights in the common property.

It is not pretended but that the appellants at the filing of the Bill were all members of the church. In the supplemental Bill filed in 1868, it is avered that Bouldin had been expelled; but this was manifestly done after the commencement of the suit. But it is not denied that all the other appellants were members of the church, and they were the parties who held the property claiming to be trustees. Bouldin, the appellees say, never was a trustee. If he held in connection with them, it was their holding and not his. And you could hardly make him liable for the whole rents of the church, where he simply held in connection with those who had undoubted right there, if not as trustees, as *members*.

So far as Bouldin was concerned, he had the right to the possession of the property by virtue of his deed of trust, which authorized him to take possession in default of payment of any part of his debt, or interest when due and unpaid; and five of his notes were due and unpaid at the time of filing the original Bill.

If the appellants had been trespassers in taking possession of the church and had held it against the rightful owner, they might, in the proper form of action and forum, been liable for mesne profits; but all the appellants, at the time of taking possession, were members of the church, and co-tenants with all the others in its property and could not, therefore, commit a trespass by entering their own property, nor by continuing in possession of it; and Bouldin could not become a trespasser after he had been expelled because his deed of trust gave him the right of possessing and holding the church.

The decree finds that the appellants owe the appellees, $4,734.12 "mesne profits, for use and occupation." Those terms are improperly joined.

"Mesne profits," are recoverable when the holding is tortious.

Adams on Eject. side p. 280.

4 Waterman on Tres., 595.

Holdfast vs. Shepard, 9, Ins. 222.

And "use and occupations," where the holding is by contract.

Waltery vs. Warren, 6 Ves. Chy. R. at p. 88.

There could be no recovery for "mesne profits," because there was and could be no *trespass*.

There could be no recovery for "use and occupation" because there was no *contract*.

If the appellants had held the common property and excluded any of the other members from the enjoyment of it, it is possible, if there was any pecuniary profit in their possession, the excluded members might have held those who expelled them to account in Equity for their shares of the profits, or might have had an action on the case for damages.

Where one tenant in common expels the other from the enjoyment of his rights in the common property, he has an action in the case for damages.

Duncan vs. Sylvester, 24 Me., 382.

Freeman on Co-tenancy and Partition, p. 296. Sec. 297 et seq.

But this property was not held for pecuniary profit at all, and I don't see how, in any aspect of the case, these appellants could be held to an accounting for the rents and profits of

the church to any of the other members. Spiritual privileges are not to be estimated by such corruptible things as silver and gold. When Simon Magus offered to buy grace from the Savior, he rebuked him, saying: "Thy money perish with thee."

Trespass for mesne profits can not be brought at law until after the recovery of the possession.

2 Waterman on Trespass, Sec. 1,159.

The rule is the same in Equity as at law, that a bill will not lie for mesne profits until after the recovery of possession.

Norton vs. Frecker, 1 Alkyns at p. 525.

So there was no right of action for "mesne profits," at the filing of the bill. These could only be recovered after possession was obtained, whether the suit be trespass at law, or bill in Equity, and there could have been no action for use and occupation because the occupation had not transpired, and because there was no relation of landlord and tenant.

After obtaining possession, if there was a right to recover for "mesne profits" or for use and occupation, the remedy was plain and adequate at law.

After decreeing specific performance, the Court refused to allow an account for damages for delay.

Anonymous, 2 Ves. 629.

THE PRAYER FOR GENERAL RELIEF.

In Tayloe vs. Merchants, Fire Ins. Co., of 9 N., at p. 406. this Court said: "The prayer for general relief will enable

the Court to make such a decree as the complainant may show himself entitled to, upon the facts set forth in the stating part of the bill.

There is not the slightest intimation or hint in either the original or supplemental bill, that the complainants claim, demand or desire a decree against the appellants for rent. They do ask an accounting with Bouldin as to his stewardship in managing the finances of the Church, but no accounting of any kind is sought with the other appellees; and while the prayer for general relief is a pretty broad blanket, it will hardly stretch over this decree.

THE STATUTE OF LIMITATIONS.

A judgment for mesne profits cannot go back of three years in this District. It was not pleaded, it is true, but it could not have been, because the claim was not made in the bill.

Bull., N. P. 88, Hare vs. Fury, 3 Yeates, (Penn.) 13 Bennett vs. Jenkins, et al. 13 John. 49 Caulkins, et al, vs. Harris, 9 John 324. Hill vs. Myers. et al.. 46 Penn. St. 15.

S. S. HENKLE,
Sol'r for Appellants.

OFFICE SUPREME COURT U. S.
FILED
NOV 8 1880
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1880.

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This is the second time this case has been before this Court. The first time the opinion was delivered by Mr. Justice Strong, and is reported 15 Wallace, 131.

As in all church controversies before the courts, the contest was over the temporalities: primarily, who owned the property, and who was entitled to its possession and control, but in the present case was added the elements of the correction of a misdescription in a deed, a required settlement of complicated monetary accounts, the avoidance of a multiplicity of suits, and the prayer and allowance of counter injunctions. These were quite sufficient to sustain equity jurisdiction. The Court accordingly took such jurisdiction, passed a decree settling the primary question in favor of the complainants, awarding to them the possession of the church premises, and directing a reference to the auditor to state the monetary accounts between the parties. From the decree of the court below passing upon the report of the auditor this second appeal is now prosecuted.

I have made a motion to dismiss the appeal. I wish it considered on the hearing.

The pleadings and original proofs in the cause were brought up on the first appeal, but have none of them been printed in this, as they should have been. I shall cite them, to show—

First. This litigation grew out of differences between Bouldin on one side and the Church, represented by the complainants, on the other, as to their monetary accounts and the amount claimed to be due from one to the other.

Second. That the bill was filed for the purpose among others of procuring a settlement of the accounts, and contained appropriate allegations and prayers for that purpose.

Third. The original decree directed a settlement of accounts and referred the cause to the Auditor for an examination and report in that regard.

Fourth. That the defendants, July, 1867, a short time before the bill was filed, entered the church building, which theretofore had been in the lawful and peaceable possession of the complainants, as trustees, by force and arms, and held possession thereof forcibly against the complainants, compelling them to go elsewhere to worship. (Rec., p. 527; old Record, pp. 112, 113, 115, 116.) The defendants sometimes used it themselves and sometimes rented it to others, until compelled, March 31, 1877, (Record, p. 53,) by process issued in accordance with decree of this Court, to deliver up the possession to the complainants.

It would appear from the present record, if complete, (p. 46, fol. 112,) that the defendants sought to deceive the Equity court, and to procure an injunction against the execution of this decree, and so prevent this transfer of possession of the property by a false sale and by fraudulent deeds of conveyance.

From these facts, and others apparent in the record, it will be argued that the decree of the court below awarding compensation to the complainants, as trustees of their church, for use and occupation of the premises by the defendants, is lawful, is in accordance with equity, and should be affirmed.

POINTS.

1. In the former trial in this Court affirming the decree of the court below, it was decided that the complainants were lawfully entitled to the possession of the premises; that the occupation and use thereof by the defendants was unlawful; that they must deliver the possession to the complainants, and the cause was referred to the auditor to state the accounts between Bouldin and the complainants, and none of these are subjects of inquiry in the present case.

When a case has been appealed, and decided on appeal, the decision of the appellate court made in the case is to be regarded as the law of *that case*, and cannot be questioned in *that case* in the lower court, neither by bill of review nor in any other manner.

Cameron *vs.* McRoberts, 3 Wheat., 591.
Cunningham *vs.* Ashley, 14 How., 377.
Lyon *vs.* Merritt, 6 Paige, (Chan.,) 473.
Browder *vs.* McArthur, 7 Wheat., 58.
Ex parte Sibbald, 12 Peters, 488, 492.
Skillern *vs.* May, 6 Cr., 267.
Wash. Bridge Co., *vs.* Stewart, 3 How., 413, 424.
Ex parte Story, 12 Peters, 339, 343.

2. Where the plaintiff is lawfully entitled to the possession of lands which have been unlawfully kept from him by the defendant, he is entitled to recover a fair compensation (known as mesne profits) for its use and occupation during the term he was excluded.

Taylor L. & T., sec. 710, 6th Ed.

Why should not this general rule be applied to these defendants? They enjoyed the use and had the occupation of our property for a season, why should they not pay for such use and occupation? If they had not used our premises they must have either hired, bought, or built a house, or else done without. But the record if complete would show that they rented the premises to the District authorities for school purposes, and it was so used for several years, the defendant Bouldin collecting and receiving the rent. This rule applied to churches and ministers.

Christian Soc. of Plymouth *vs.* Macomber, 5 Metc., 155.

Lynd *vs.* Menzies, 33 N. J., 168.

3. If the defendants take possession of the property of the complainants and use it for themselves, thus preventing the complainants from using and enjoying it, the law creates an obligation that they shall make compensation therefor. And in the absence of any agreement fixing the amount, the law fixes the fair value of the use of the premises as the amount of compensation.

3 Parson Contr., p. 155.

It is immaterial to what use they put the premises—whether they used it themselves or rented it to others—the effect upon the complainants is the same. Their detriment was the same in either case. They were compelled by the wrongful acts of the defendants either to hire, buy, build a place of worship, or do without, and by reason of this detriment or damage they are entitled to compensation.

Damage to the promisee constitutes as good a consideration as benefit to the promisor.

Townsley *vs.* Sumrall, 2 Pet., 182.

4. A church organization whether incorporated or not is not a partnership in any legal sense, nor is it to be governed by the law relating to partnerships.

There is no *contract* between the persons forming a church organization; they do not join their money, goods, labor or skill; there is no profit to be divided or loss to be borne, and they do not join for the purpose of trade, business or adventure.

Collyer on Partnership, 6th Ed., pp. 7, 37, 47.
3 Kent. Com., 23.
In re St. James Club, 13 Eng. L. & Eq., 589, 594., S. C. 2 De G., Mac. & G., 383.
Caldicott *vs.* Griffiths, 8 Exch. Rep., 898, 904.
Fleming *vs.* Hector, 2 M. & W., 172.
Lafond *vs.* Deems, N. Y. Court of Appeals, decided Sept. 21, 1880, Albany Law J., p. 315.

5. A court of equity having obtained jurisdiction of a cause for one purpose will retain it for all purposes, and will proceed to make such decree as justice and equity may require.

1 Story Eq. Juris., secs. 71, 73.
2 Story Eq. Juris., secs. 794, 799.
Warner *vs.* Daniels, 1 W. & M., 103, 112.
Hepburn *vs.* Dunlap, 1 Wheat., 197.
Foster *vs.* Swasey, 2 W. & M., 217, 221.
McCalmont *vs.* Lawrence, 1 Blatchf., 232.
Alney *vs.* Wilbur, 2 W. & M., 371, 379.

6. This has been extended to include cases of rent.

Taylor, L. & T., 6th Ed., p. 506, secs. 65, 67; p. 508, sec. 658; p. 509, sec. 660.
1 Story Eq. Juris., secs. 508 to 514, 684, 684 a.
Livingston *vs.* Livingston, 4 John Ch., 287.
Landsdowne *vs.* Landsdowne, 1 Madd., 111, 138.
Dormer *vs.* Fortescue, 3 Atk., 129.
Coventry *vs* Hall, 2 Ch. Cas. 2d part, p. 134.
Poultney *vs.* Warren, 6 Ves., 73.
Bernet *vs.* Whithead, 2 P. W. M., 644.
Bac. Abr. Tit. Accompt. B.

Attorney Gen'l *vs.* Pearson, 3 Merivale, 418.
Hepburn *vs.* Dundas, 1 Wheat., 203.
Taylor *vs.* Whiting, 9 Dana, 399; see 8 Dana, 403.

7. The possession by the defendants of the church having been wrongful, unlawful, obtained by force, and maintained and kept by fraud, they are to be treated with much greater severity than a well disposed, good intentioned person who has mistaken his right or his remedy.

Robertson *vs.* Norris, 5 Jurist N. S., 1238.
1 Story Eq. Juris., Sec. 514 a.

THOMAS WILSON,
Attorney for Appellees.